

Message Text

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ACTION EUR-12

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R 081820Z NOV 77
FM AMEMBASSY BONN
TO SECSTATE WASHDC 2967
INFO AMEMBASSY BERLIN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
AMEMBASSY PARIS
USMISSION USBERLIN
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C O N F I D E N T I A L SECTION 01 OF 03 BONN 18641

E.O. 11652: XGDS - 1
TAGS: PGOV, BQG
SUBJECT: VISIT TO BERLIN OF FRG INTERIOR MINISTER

REFS: (A) BONN 13151; (B) BONN 13080
(C) USBER 2054;H(D) BONN 12830
(E) 76 USBER 2161; (F) 16 BONN 16015

BEGIN SUMMARY:H THE FRG HAS GIVEN THE BONN GROUP THE
WRITTEN OPINION OF THE MINISTRY OF INTERIOR ON THE LEGAL
SIGNIFICANCE OF INTERIOR MINISTER MAIHOFFER'S ACTION IN
HANDING OVER A LETTER OF APPOINTMENT TO A COURT OFFICIAL
IN BERLIN. THE MOI STUDY CONFIRMS -- AS WE HAD EARLIER
BELIEVED -- THAT PRESENTATION OF THE APPOINTMENT LETTER
WAS NOT MERELY CEREMONIAL BUT WAS AN OFFICIAL ACT
CONSTITUTING THE FINAL STEP IN THE APPOINTMENT PROCESS.
IT CONCLUDES, HOWEVER, THAT IT WAS NOT AN ACT "IN
EXERCISE OF DIRKT STATE AUTHORITY OVER THE WESTERN
SECTORS OF BERLV," ONLY AN INTERNAL PERSONNEL MATTER OF
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THE FEDEJL GOVERNMENT, WITH NO EFFECT UPON BERLIN. WE
CONSIDER THAT MAIHOFFER'S ACTION WAS NOT ILLEGAL BUT
WE BELIEVE THAT IT WAS POLITICALLY
INOPPORTUNE AND THAT WE SHOULD SEEK A COMMON ALLIED
POSITION SO TO INFORM THE FRG IN THE BONN GROUP. ACTION
REQUESTED: SEE PARAGRAPH 14.H END SUMMARY

1. AT TY OCTOBER 4 BONN GROUP MEETING, THE FRG REP (VON BRAQNMUEHL) DISTRIBUTED THE MINISTRY OF INTERIOR STUDY (PREPARED AT THE FOREIGN OFFICE'S REQUEST, REF A) ON THE LEGAL CONSEQUENCES OF MAIHOFFER'S ACTION IN HANDING A LETTER OF APPOINTMENT TO OBERBUNDESANWALT FRAUENKNECHT AT THE FEDERAL ADMINISTRATIVE COURT IN BERLIN. (COPIES OF THE STUDY HAVE BEEN POUCHED TO EUR/CE AND USBERLIN.)

2. THE STUDY, WHICH ADDRESSED QUESTIONS RAISED BY THE ALLIED REPS IN THE BONN GROUP (REF A), STATES THAT THE BUNDESBEAMTENGESETZ (LAW REGARDING FEDERAL OFFICIALS) REQUIRED THAT FRAUENKNECHT BE APPOINTED TO HIS NEW OFFICE BECAUSE IT INVOLVED A NEW FUNCTION AND TITLE. THE APPOINTMENT REQUIRED, ACCORDING TO THE SAME LAW, THE HANDING OVER OF THE SIGNED LETTER OF APPOINTMENT TO THE OFFICIAL. BOTH THE SIGNATURE OF THE LETTER BY FEDERAL PRESIDENT SCHEEL AND COUNTER-SIGNATURE BY MINISTER MAIHOFFER TOOK PLACE IN BONN. MAIHOFFER GAVE THE LETTER OF APPOINTMENT TO FRAUENKNECHT AT A CEREMONY HELD IN BERLIN ON JULY 29 TO HONOR FRAUENKNECHT'S PREDECESSOR AND TO INAUGURATE FRAUENKNECHT INTO HIS NEW OFFICE.

3. ALTHOUGH THE MOI ADMITS THAT THIS CONSTITUTED AN OFFICIAL ACT ON THE PART OF MAIHOFFER, IT CONTENDS THAT NO VIOLATION OF THE QA WAS INVOLVED BECAUSE IT WAS NOT CONFIDENTIAL

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AN ACT "IN EXERCISE OF DIRECT STATE AUTHORITY OVER THE WESTERN SECTORS OF BERLIN". IT WAS, ACCORDING TO THE STUDY, AN ADMINISTRATIVE ACTION DEALING WITH AN INTERNAL PERSONNEL MATTER OF THE FEDERAL GOVERNMENT, WITH NO EFFECT AT ALL ON BERLIN.

4. THE STUDY CONCLUDES WITH THE COMMENT THAT MAIHOFFER'S ACTION "...CANNOT BE VIEWED AS DIFFERENT FROM THE HANDING OUT OF ALL OTHER LETTERS OF APPOINTMENT, WHICH AS A GENERAL RULE IS DONE FOR SUBORDINATE OFFICIAL LEVELS OF A FEDERAL MINISTRY AT THE EMPLOYING AUTHORITY ITSELF. INsofar AS THIS AUTHORITY (THE FEDERAL ADMINISTRATIVE COURT) HAS ITS SEAT IN CONFORMITY WITH THE QA IN BERLIN, THIS IS DONE IN BERLIN ITSELF. IT IS, FURTHERMORE, A CUSTOM IN THE CASE OF SENIOR CIVIL SERVANTS THAT THE LETTER OF APPOINTMENT BE GIVEN TO THEM PERSONALLY BY THE FEDERAL MINISTER TO WHOSE AREA OF RESPONSIBILITY THEY BELONG."

5. COMMENT. WE WOULD AGREE THAT THE STUDY WAS CORRECT IN ITS CONCLUSION THAT -- STRICTLY INTERPRETED -- THERE WAS NO VIOLATION OF THE QA, INASMUCH AS MAIHOFFER'S

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PERFORMANCE OF AN ACT OF STATE AUTHORITY WAS ONLY "IN"
BERLIN AND NOT "OVER" BERLIN. THIS WOULD HAVE TO HAVE
BEEN OUR RESPONSE TO THE SOVIETS IF THEY HAD PROTESTED
(AND WE ARE STILL SOMEWHAT SURPRISED THAT THEY MISSED
THIS ONE).

6. THE SOVIETS DID PROTEST A SIMILAR VISIT TO BERLIN
LAST YEAR BY FEDERAL JUSTICE MINISTER VOGEL, WHO ALSO
ATTENDED THE SWEARING IN OF A COURT OFFICIAL. IN
RESPONSE TO THAT PROTEST, THE ALLIES STATED (REF F)
THAT VOGEL'S PARTICIPATION WAS "OF A CEREMONIAL NATURE
WITH NO LEGAL EFFECT AND COULD NOT CONSTITUTE AN
EXERCISE OF DIRECT STATE AUTHORITY OVER THE WESTERN
SECTORS OF BERLIN." THE INTERIOR MINISTRY STUDY
CONFIRMS OUR EARLIER IMPRESSION THAT WE WOULD NOT HAVE
BEEN ABLE TO MAKE SUCH A RESPONSE HAD WE RECEIVED A
PROTEST ON THE MAIHOFFER VISIT.

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7. MAIHOFFER'S WELL-PUBLICIZED ROLE IN THE FRAUENKNECHT INDUCTION CEREMONY HAS BEEN A SOURCE OF CONSIDERABLE CONCERN TO THE BRITISH AND FRENCH, AS REPORTED IN REF D. MORE RECENTLY, AT THE OCTOBER 25 BONN GROUP MEETING, THE FRENCH REP (RICHARD) SAID PARIS BELIEVED THAT MAIHOFFER'S ACTION WAS "AT THE LIMIT OF THE LEGAL POSSIBILITIES" (OFFERED BY THE QA). RICHARD ASKED WHETHER THE FRG FELT THAT SUCH ACTION HELPED THE SITUATION IN BERLIN. AT THE NOVEMBER 3 MEETING, RICHARD SUGGESTED THAT THE INTERIOR MINISTRY STUDY BE DISCUSSED MORE FULLY BEFORE HE REPORTED TO PARIS. NEITHER THE US NOR THE UK REP HAS AS YET COMMENTED ON THE STUDY, BUT BOTH HAVE STATED THAT THEY MIGHT HAVE COMMENTS AT A LATER DATE.

8. AFTER WEIGHING THE PROS AND CONS OF THE MATTER, THE EMBASSY RECOMMENDS THAT THE US BONN GROUP REP BE INSTRUCTED TO EXPRESS US DOUBTS ABOUT THE WISDOM OF THE MAIHOFFER ACTION.

9. ARGUING AGAINST SUCH A DEMARCHE BY THE US IS THE POLITICAL SENSITIVITY OF CRITICIZING THE PERSONAL ACTION OF A FEDERAL MINISTER, PARTICULARLY WHEN WE ARE UNABLE TO SUGGEST THAT WE CONSIDER HIS ACTIONS ILLEGAL. IN ADDITION, ANY SUCH CRITICISMS INEVITABLY RAISE QUESTIONS IN THE MINDS OF THE GERMANS AS TO WHETHER WE ARE CONSIDERING TAKING A MORE RESTRICTIVE POSITION ON THE GENERAL QUESTION OF THE FEDERAL PRESENCE IN BERLIN. THE BASIC PROBLEM IN THIS CASE, AFTER ALL, STEMS FROM THE FACT THAT THE ALLIES LONG AGO AGREED TO THE PRESENCE OF THE FEDERAL ADMINISTRATIVE COURT IN BERLIN; FROM THE FRG VIEWPOINT, IT IS PERHAPS NATURAL THAT THE RELEVANT

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CABINET MINISTER WOULD PRESIDE OVER RETIREMENT AND INDUCTION CEREMONIES FOR SENIOR OFFICIALS OF THAT COURT.

10. THERE ARE, HOWEVER, SEVERAL ARGUMENTS FOR LAYING DOWN A MARKER IN THIS CASE, AND THESE IN OUR VIEW OVERRIDE THE OBJECTIONS NOTED ABOVE:

-- OFFICIAL ACTIONS BY FEDERAL MINISTERS IN BERLIN ARE, UNDER THE SOVIET INTERPRETATION, PROHIBITED BY ANNEX 2 OF THE QA; IT IS WALKING A PRETTY THIN LINE TO INSIST THAT SUCH ACTIONS MAY BE PERFORMED SO LONG AS

THEY ARE NOT ACTIONS OF DIRECT STATE AUTHORITY "OVER"
BERLIN AND THUS ARE NOT RULED OUT BY THE INTERPRETATIVE
LETTER OF THE THREE AMBASSADORS.

-- THE UNDERSTANDING THAT FEDERAL ACTIONS IN BERLIN
BE WEIGHED NOT ONLY FOR LEGALITY BUT ALSO FOR POLITICAL
OPPORTUNENESS IMPLIES THE NEED FOR CLOSE CONSULTATION
AMONG THE FRG AND THE ALLIES. TIMING IS AN IMPORTANT
FACTOR, AND MAIHOFFER'S VISIT -- CONCERNING WHICH THE
ALLIES HAD NO ADVANCE NOTICE -- CAME IN THE SAME TIME
FRAME AS OTHER FRG ACTIONS WHICH THE SOVIETS CONSIDERED
PROVOCATIVE -- THE BAUM STATEMENT AND THE FEDERAL
PROSECUTOR'S STATEMENTS CONCERNING THE LORENZ TRIAL.

-- MAIHOFFER'S ACTION SHOWED WHAT APPEARS TO BE A
CONTINUING LACK OF SENSITIVITY ON THE PART OF MINISTRIES
OTHER THAN THE FOREIGN OFFICE TO THE IMPORTANCE OF AVOID-
ING PROVOCATIVE ACTIONS IN BERLIN. WE KNOW THAT THE
FOREIGN OFFICE IN GENERAL SHARES ALLIED CONCERNS; IT
PROBABLY WAS NOT UNHAPPY TO PASS ON THE ALLIED REQUEST
TO THE INTERIOR MINISTRY FOR INFORMATION CONCERNING THE
NATURE AND SIGNIFICANCE OF MAIHOFFER'S ACTION. WERE

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WE NOW SIMPLY TO ACCEPT THE MOI REPORT WITHOUT COMMENT,
WE WOULD BE UNDERCUTTING THE CONTINUING EFFORT OF THE
FOREIGN OFFICE TO SENSITIZE OTHER PARTS OF THE GOVERN-
MENT TO THE IMPORTANCE OF HANDLING BERLIN ISSUES
DISCREETLY.

11. AN INSTRUCTED US COMMENT IN THE BONN GROUP MIGHT
APPROPRIATELY TAKE THE FOLLOWING LINES:

A. WE APPRECIATE THE FRG'S EFFORTS IN PREPARING
THE REPORT ON THE MAIHOFFER VISIT AND HAVE READ IT
WITH INTEREST.

B. QUITE APART FROM THE QUESTION OF THE LEGALITY
OF SUCH FRG ACTIONS IN BERLIN, THE POLITICAL OPPORTUNE-
NESS OF SUCH ACTIONS MUST ALSO BE CONSIDERED.

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C. THE PRESENCE OF FEDERAL OFFICES IN BERLIN --
AND PARTICULARLY FEDERAL COURTS -- IS A SOURCE OF
CONTINUING DIFFERENCES AND DIFFICULTIES WITH THE SOVIETS
AND HIGHLY-PUBLICIZED ACTS SUCH AS THE ONE IN QUESTION
CAN ONLY EXACERBATE TENSIONS CONCERNING THE OFFICES.
WE QUESTION WHETHER SUCH ACTIONS ARE IN THE INTEREST
OF BERLIN, THE FRG OR THE ALLIES, ESPECIALLY WHEN IN
OUR VIEW THE PRACTICAL BENEFIT TO BERLIN (QUITE APART
FROM ANY NEGATIVE CONSEQUENCES IT MIGHT HAVE) IS NOMINAL
AT BEST.

D. IN RESPONSE TO THE SOVIET PROTEST ON THE VISIT
OF JUSTICE MINISTER VOGEL LAST YEAR, THE ALLIES STATED
THAT THE MINISTER'S PARTICIPATION WAS "OF A
CEREMONIAL NATURE WITH NO LEGAL EFFECT AND COULD NOT
CONSTITUTE AN EXERCISE OF DIRECT STATE AUTHORITY OVER
THE WESTERN SECTORS OF BERLIN." A SIMILAR REPLY WOULD
NOT HAVE BEEN POSSIBLE HAD THERE BEEN A PROTEST ON THE
VISIT IN QUESTION.

E. FINALLY, NEITHER THE FOREIGN OFFICE NOR THE
ALLIES WERE PROVIDED WITH ANY ADVANCE NOTICE OF THIS
VISIT, AND THE INITIAL INFORMATION PROVIDED IN THE BONN

GROUP THAT THE VISIT WAS MERELY CEREMONIAL IN NATURE
PROVED INCORRECT. WE REGRET THE LAPSES ON BOTH POINTS
AND WILL APPRECIATE WHATEVER THE FRG CAN DO TO ENSURE
IMPROVED COORDINATION IN THE FUTURE.

12. NOTE: IT WOULD, OF COURSE, BE NECESSARY TO STOP
SHORT OF STATING THAT WE BELIEVE MINISTERIAL VISITS TO
BERLIN SHOULD NOT BE PERMITTED IN THE FUTURE. WE WOULD
ALSO AVOID IMPLYING ANY QUESTIONING OF THE STATUS OF THE
FEDERAL COURTS OR AGENCIES IN BERLIN. OUR PURPOSES,
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RATHER, WOULD BE (A) TO INDUCE GREATER SELF-RESTRAINT
ON THE PART OF THE GERMANS AND (B) TO ENCOURAGE ADVANCE
CONSULTATIONS WITH THE ALLIES CONCERNING THOSE
ACTIVITIES WHICH THE GERMANS ARE CONTEMPLATING AFTER THEY
HAVE FIRST DETERMINED INTERNALLY THAT THEY ARE PROPER.

13. WE WOULD INVITE THE BRITISH AND FRENCH REPS TO JOIN
US IN MAKING SUCH A DEMARCHE AND ASSUME ON THE BASIS OF
THEIR PREVIOUS COMMENTS THAT THEY WOULD BE WILLING TO DO
SO.

14. ACTION REQUESTED: THAT THE DEPARTMENT PROVIDE
INSTRUCTIONS FOR COMMENTS BY THE US REP ALONG LINES
SUGGESTED IN PARA 11 ABOVE.
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Message Attributes

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